No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Independent Counsel

BRETT M. KAVANAUGH
CRAIG S. LERNER
Associate Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

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QUESTIONS PRESENTED

1. Whether the attorney-client privilege in federal criminal proceedings applies to the same extent when the client is deceased as it does when the client is alive.

2. Whether the work product doctrine applies in federal criminal proceedings when the client for whom the work was performed is deceased and the work product consists of notes of an interview with the deceased client.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 124 F.3d 230. The order of the court of appeals denying the suggestion for rehearing in banc (Pet. App. 27a-32a) is reported at 129 F.3d 637. The opinions of the district court (Pet. App. 33a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1997. The court of appeals denied a petition for rehearing and suggestion for rehearing in banc on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Grand Jury Clause of the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

Rule 501 of the Federal Rules of Evidence provides in relevant part: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT

Federal grand jury subpoenas were issued to petitioners for notes of a July 11, 1993, conversation between petitioner James Hamilton and his client, Vincent W. Foster, Jr., who is now deceased. Without elaboration, the district court concluded that the attorney-client privilege and work product doctrine protected the notes. The court of appeals reversed. Because the client was deceased, the court held that the attorney-client privilege did not bar production. The court also concluded that, under the facts of this case, the work product protection did not apply.

1. a. Vincent W. Foster, Jr., assumed office as Deputy White House Counsel on January 20, 1993. Before that date, Mr. Foster had been an attorney at the Rose Law Firm in Little Rock, Arkansas. At the Rose firm, he was

a partner and friend of Hillary Rodham Clinton, Webster L. Hubbell, and William H. Kennedy.

On May 19, 1993, David Watkins, Assistant to the President for Management and Administration, discharged seven career employees of the White House Travel Office. White House spokesperson Dee Dee Myers announced that the FBI was conducting a criminal inquiry into the activities of the fired employees.[1]

The dismissal of the Travel Office employees produced an immediate controversy about why the employees had been fired and why the White House had involved the FBI in the matter. Thereafter, the White House offered five of the employees reinstatement to government employment. The White House further responded by conducting an internal investigation into the firings. On July 2, 1993, the White House issued a public report of that investigation. Chief of Staff Thomas F. McLarty reprimanded four White House officers and employees (including David Watkins and Associate Counsel William Kennedy) for their actions in connection with the firings. Although Mr. Foster was not reprimanded, the White House report recounted his apparent role in the events leading to the firings.

Controversy over the Travel Office firings did not abate with the White House's report and the publicly announced reprimands. On July 2, 1993, the President signed the Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, which required the General Accounting Office to conduct a review of the firings. At the same time, calls were issued for further congressional or federal law enforcement investigation into the matter.

b. On Sunday, July 11, 1993, Mr. Foster met with petitioner James Hamilton, an attorney at Swidler & Berlin

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[1] The basic facts of the Travel Office matter are described in a variety of agency and congressional reports. See H.R. Rep. No. 104-849 (Sept. 26, 1996); GAO, *White House Travel Office Operations* (May 2, 1994); White House, *White House Travel Office Management Review* (July 2, 1993).

(also a petitioner). Mr. Hamilton had provided legal assistance to the 1992 Clinton Campaign, had served as one of four Counsel to the Clinton-Gore Transition, and had assisted Mr. Foster in the process of selecting nominees. The July 11 conversation between Mr. Foster and Mr. Hamilton related to Mr. Hamilton's legal representation of Mr. Foster and the White House concerning possible congressional or other investigations. J.A. 5. Mr. Hamilton took notes during the meeting. *Ibid.* Those notes are the subject of the grand jury subpoenas at issue here.

On July 20, 1993, nine days after the Foster-Hamilton meeting, police and medical personnel were called to Fort Marcy Park, Virginia. They found Mr. Foster dead with a gun in his hand and a gunshot wound to the head. The United States Park Police conducted an investigation of the death and concluded three weeks later that Mr. Foster had committed suicide by gunshot in Fort Marcy Park (a conclusion confirmed by subsequent investigations).

The events surrounding the Travel Office firings were investigated by the GAO, the Office of Professional Responsibility of the Department of Justice, and the Committee on Government Reform and Oversight of the United States House of Representatives. All three entities produced extensive reports on the matter.

c. On January 3, 1996, after the conclusion of several investigations into the Travel Office firings (and while an investigation by the House of Representatives was ongoing), the White House reported that it had uncovered a memorandum written by David Watkins in the fall of 1993. The White House indicated that a White House attorney discovered the memorandum while searching the stored files of an aide who had worked for Mr. Watkins.

Mr. Watkins' 1993 memorandum suggested that Mrs. Clinton may have played a role in the events leading to the Travel Office firings. It stated: "[T]he First Lady took interest in having the Travel Office situation resolved quickly . . . . Foster regularly informed me that the First

Lady was concerned and desired action—the action desired was the firing of the Travel Office." H.R. Rep. No. 104-849, at 41. The memorandum thus raised questions whether prior testimony of Mr. Watkins (and others) about Mrs. Clinton's role in the Travel Office matter had been truthful.

In March 1996, based in large part on the Watkins memorandum, Attorney General Reno requested the Special Division of the United States Court of Appeals for the District of Columbia Circuit to expand the jurisdiction of the Office of Independent Counsel (OIC) to investigate whether Mr. Watkins—or other individuals—made false statements, committed perjury, obstructed justice, or committed other crimes during investigations of the Travel Office matter. See 28 U.S.C. 593(c). The Special Division thereafter granted the OIC jurisdiction to conduct that investigation and all related matters. See 28 U.S.C. 593(b)(3).[2]

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[2] By way of background: On August 5, 1994, the Special Division, at Attorney General Reno's request, appointed the Independent Counsel to investigate and prosecute crimes "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guaranty Savings & Loan Ass'n*, Order at 1-2 (D.C. Cir. Spec. Div. Aug. 5, 1994).

This appointment arose out of a series of events. In October 1993, the Department of Justice received nine criminal referrals from the Resolution Trust Corporation. The criminal referrals listed as subjects James B. McDougal, the former owner of Madison Guaranty Savings & Loan Association in Little Rock; his wife, Susan H. McDougal; and Jim Guy Tucker, who had succeeded President Clinton as Governor of Arkansas and previously had been a Little Rock businessman. The referrals listed the Clintons as witnesses. Mrs. Clinton had represented Madison Guaranty as an attorney at the Rose Law Firm in the mid-1980s. The McDougals and the Clintons had together owned the Whitewater Development Corporation, a real estate development company, from 1978 to December 1992. Also in the fall of 1993, Little Rock businessman and former Judge David L. Hale stated that in 1986 he

The OIC thereupon began an intensive investigation of the facts and circumstances with respect to the Travel Office matter. Mr. Foster would have been a significant witness in the investigation: He had talked to Mr. Watkins about the Travel Office prior to the firings, and he was one of only a handful of persons known to have talked with Mrs. Clinton about the matter. If alive, Mr. Foster would have been in a position to provide valuable information, whether inculpatory or exculpatory. In light of Mr. Foster's death, the communications from Mr. Foster to Mr. Hamilton on July 11, 1993, would be important in understanding Mr. Foster's role in the Travel Office events and in understanding the roles of others—and thus in determining whether individuals made false statements, committed perjury, obstructed justice, or committed other federal crimes.

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had discussed with then-Governor Clinton a fraudulent loan of $300,000 from Capital Management Services, Mr. Hale's small business investment corporation, to Master Marketing, a fictitious "company" owned by Susan McDougal. Portions of that $300,000 subsequently were used for the benefit of the Whitewater Development Corporation.

In December 1993, it was publicly revealed that documents related to the Whitewater corporation had been in the White House office of Mr. Foster at the time of his death and had not been reviewed by Justice Department attorneys who had sought (but not been allowed) to review all of Mr. Foster's documents the day after his death. Mr. Foster had served as attorney for the Clintons for the 1992 transfer of the Clintons' interest in Whitewater to James McDougal. Mr. Foster also was involved in overseeing the preparation of the Clintons' tax returns in April 1993, on which they addressed the Whitewater investment. During the 1992 campaign, Mr. Foster and Webster Hubbell had assisted Mrs. Clinton in answering media inquiries about Mrs. Clinton's legal work, including for Madison.

During the OIC's ensuing investigation of these and other matters, fourteen individuals have been convicted of federal crimes. They include Jim Guy Tucker, James McDougal, Susan McDougal, David Hale, and Webster L. Hubbell, the former Associate Attorney General of the United States and a former law partner of Mrs. Clinton and Mr. Foster.

2. a. On December 4, 1995, federal grand jury subpoenas were issued to petitioners for, among other things, Mr. Hamilton's notes of his July 11, 1993, meeting with Mr. Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney-client privilege and work product doctrine.[3]

On December 16, 1996, the district court (Judge John Garrett Penn) denied enforcement of the subpoena for the July 11 notes, holding without elaboration or explanation that the notes were covered by the attorney-client privilege and the work product doctrine.

b. The court of appeals (Judge Williams, joined by Judge Wald) reversed and remanded. The court noted that in the vast majority of cases to have addressed the issue—particularly decisions concerning a testator's intent in a will dispute—courts have held that the attorney-client privilege does not apply after the death of the client. Pet. App. 3a. The court also emphasized that virtually all commentators have "supported some measure of post-death curtailment" of the privilege. *Id.* at 4a (referring to scholars such as McCormick, Wright and Graham, Mueller and Kirkpatrick, and Judge Learned Hand). The court further pointed out that the American Law Institute (ALI), in the 1996 Proposed Final Draft of the Restatement (Third) of the Law Governing Lawyers, concluded that the privilege should not apply after the death of the client. *Id.* at 5a.

Turning to policy, the court stated: "The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally

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[3] The subpoenas were initially issued during the OIC's grand jury investigation into activities connected to Mr. Foster's death and the aftermath. The OIC subsequently received jurisdiction to investigate the Travel Office matter in March 1996, and the July 11 notes are likewise relevant and important to that aspect of the OIC's grand jury investigation.

invoked as an explanation of why the privilege only slightly impairs access to truth." *Id.* at 7a. The court further stated that there would be little if any additional chilling effect caused by curtailing the privilege after death. Criminal liability will have ceased altogether, so the decedent's legal interests could not be harmed in any way by disclosure in federal criminal proceedings after death. *Id.* at 6a-8a.

With respect to the work product issue, the court distinguished factual information contained in an attorney's notes of an interview from the attorney's own evaluations in cases where need has been shown. The court stated that "[o]ur brief review of the documents reveals portions containing factual material . . . ." *Id.* at 14a.

Judge Tatel dissented on the attorney-client privilege issue.

SUMMARY OF ARGUMENT

The court of appeals, the vast majority of judicial decisions, virtually all leading commentators, and the American Law Institute have properly concluded that the attorney-client privilege should not apply when the client is deceased.

In the courts, the issue has almost always arisen in will-contest disputes among the testator's heirs or devisees. In those cases, courts uniformly have held that the attorney-client privilege does not apply after the death of the client. These testamentary cases reflect a settled policy judgment: The interest in settling estates outweighs any interest in the posthumous confidentiality of attorney-client communications. That reasoning applies with even greater force in a criminal investigation, where the need for relevant evidence is at its apex. Applying the privilege after death in criminal proceedings, but not in will contests, would create an irrational asymmetry in the law.

The client's legal interests are not adversely affected by a rule that the privilege does not apply after death in

criminal proceedings. All possibility of criminal liability has ceased at death. In addition, the decedent's estate cannot be harmed by disclosure of the information in criminal proceedings. Petitioners point extensively to harms to reputation and to other persons. But the flaw in that argument is that the decedent's attorney would disclose the same factual information that the client would have disclosed were he or she alive. An interest in reputation, or in protecting others, does not justify nondisclosure of information before or after death.

On the other hand, application of the privilege after the client's death hinders the truthseeking process far more than application of the privilege while the client is living. The client is no longer available to be asked what he knows. For that reason, as the court of appeals explained, the "costs of protecting communications after death are high." Pet. App. 7a.

Petitioners contend that candid communications would be chilled by a rule that the privilege does not apply after death. That is not true for the client who plans to invoke the Fifth Amendment or testify truthfully. Only the client who otherwise is planning to perjure himself would be less candid with his attorney because of a rule that the privilege does not apply after death.

Even assuming that there is a chilling effect, it would be marginal. And marginal chilling effects, the law has established, do not outweigh the grand jury's need for relevant evidence.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY IN FEDERAL CRIMINAL PROCEEDINGS WHEN THE CLIENT IS DECEASED.

A. Privileges are strictly construed, for they are in derogation of the search for truth.

We are not aware of any other reported federal case addressing whether the attorney-client privilege applies in

criminal proceedings when the client is deceased.[4] Analysis thus begins with bedrock principles that guide judicial analysis of privilege claims.

Rule 501 of the Federal Rules of Evidence provides that "[t]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934) (establishing common-law standard). The Rule is to be "construed . . . to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. In light of its truthseeking role, the Court is "disinclined to exercise [its Rule 501] authority expansively." *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 189 (1990). To the contrary, "[c]ourts have historically been cautious about privileges." *United States* v. *Nixon*, 418 U.S. 683, 710 n.18 (1974). The primary rationale underlying the caution is straightforward: "[P]rivileges obstruct the search for truth," *Branzburg* v. *Hayes*, 408 U.S. 665, 690 n.29 (1972), and "contravene the fundamental principle that the public has a right to every [person's] evidence," *University of Pennsylvania*, 493 U.S. at 189 (quotation omitted).

The principles applied by this Court are consistent with the paramount goal of truthseeking: Privileges "are not lightly created," *Nixon*, 418 U.S. at 710, and "must be strictly construed," *University of Pennsylvania*, 493 U.S. at 189 (quotation omitted).[5] A privilege applies only where it is "necessary to achieve its purpose," *Fisher* v. *United States*, 425 U.S. 391, 403 (1976), and "promotes

[4] This case in no way affects the ethical rules governing attorneys. Those rules restrict an attorney's *voluntary* disclosure of information, including information not covered by the attorney-client privilege. See ABA Model Rule of Professional Conduct 1.6.

[5] The "manifest destiny of evidence law is a progressive lowering of the barriers to truth." C. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Tex. L. Rev. 447, 469 (1938).

sufficiently important interests to outweigh the need for probative evidence," *Jaffee* v. *Redmond*, 518 U.S. 1, 9-10 (1996). And "the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." *Branzburg*, 408 U.S. at 682 n.21 (quotation omitted).[6]

Context also counts. This Court has specifically recognized that *criminal* matters pose an especially compelling need for relevant evidence. The "longstanding principle that the public has a right to every [person's] evidence . . . is particularly applicable to grand jury proceedings." *Branzburg*, 408 U.S. at 688. The Court has indicated that several privileges do *not* apply in criminal proceedings although they may apply in civil proceedings. *Id.* at 686-701; *Nixon*, 418 U.S. at 712 n.19; cf. 1 *McCormick on Evidence* § 104, at 388 (4th ed. 1992) (some States deny physician-patient privilege "in criminal cases generally, or in felony cases, or in cases of homicide"); H.R. 2676, 105th Cong. (1997) (providing for limited accountant-client privilege in "noncriminal proceedings" in federal courts).

Not only do privileges obstruct the search for truth, federal courts lack clear guideposts for deciding whether to recognize one proposed privilege or another. Indeed, determining their relative effects on the truthseeking process is a "stupefying complex task." F. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309, 361. For these reasons, this Court has recognized privileges and defined their scope only to the extent established by the common law or in the States—and only to the extent that they serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee*, 518 U.S. at 9

[6] See 8 J. Wigmore, *Evidence* § 2290, at 543 (McNaughton rev. 1961) ("[T]he judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy.").

(quotation omitted); see *University of Pennsylvania*, 493 U.S. at 188-195; *Trammel* v. *United States*, 445 U.S. 40, 47-53 (1980); *United States* v. *Gillock*, 445 U.S. 360, 366-368 (1980). Beyond this narrow category, "[t]he balancing of conflicting interests of this type is particularly a legislative function." *University of Pennsylvania*, 493 U.S. at 189.

These principles of restraint and deference combine, in practical effect, to create a strong presumption that federal courts should apply a privilege (i) no more broadly than the law (decisional or statutory) has established and (ii) no more broadly than necessary to serve a public good. Petitioners' privilege claim satisfies neither requirement.

B. Virtually all leading commentators agree that the attorney-client privilege should not apply after the death of the client.

The attorney-client privilege, as applied in federal courts, has emerged from the balancing of the public's need for relevant information in legal proceedings against the client's need to communicate with his or her attorney to secure effective legal representation. See *United States* v. *Zolin*, 491 U.S. 554, 562 (1989); see also *Upjohn Co.* v. *United States*, 449 U.S. 383, 389-390 (1981) (corporate client). The privilege excludes relevant and reliable information, however, and thus "is not without its costs." *Zolin*, 491 U.S. at 562.[7] As with other exclusionary rules, therefore, the attorney-client privilege is carefully confined and applied only in circumstances where it is "necessary" to serve its purpose. *Fisher*, 425 U.S. at 403.

[7] These costs led Wigmore to state that the privilege is "an obstacle to the investigation of the truth"—the benefits of which are "all indirect and speculative" while the "obstruction is plain and concrete." Wigmore § 2291, at 554. Professor Fischel recently has argued that "[t]he legal profession, not clients or society as a whole, is the primary beneficiary" of the privilege. D. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 3 (1998).

Numerous exceptions and qualifications have developed to cabin the privilege's effects. It does not apply, for example, to client communications seeking business or political or personal advice. See *McCormick* § 88, at 322-324. The privilege is overridden when client and attorney become embroiled in a dispute. See S. Stone & R. Taylor, *Testimonial Privileges* § 1.66, at 1-177 to 1-179 (1997). It generally does not apply to attorney fee information. See Restatement § 119 cmt. g. The privilege does not cover communications made in furtherance of a client's crime or fraud. See *Zolin*, 491 U.S. at 562-563. Indeed, ethical rules prohibit an attorney from allowing a client to commit perjury, notwithstanding the breach of attorney-client confidentiality and the correspondingly "grave consequences" that may ensue for the client. ABA Model Rule of Professional Conduct 3.3 & cmt.; see *Nix* v. *Whiteside*, 475 U.S. 157, 166-176 (1986).[8] In light of these many limitations and exceptions, petitioners' sweeping broadside that a lawyer can and should be able to give his or her client "an *unqualified* assurance of confidentiality," Pet. Br. 11 (emphasis added), reflects a serious misapprehension of existing law. That body of law is richly textured and far more nuanced and sensitive to truthseeking values than the monolithic absolutism championed by petitioners.[9]

[8] In addition, the attorney-client privilege, like all common-law privileges recognized under Rule 501, is an *ex post* rule of admissibility in federal court proceedings, not a constitutionally mandated *ex ante* guarantee of confidentiality. The scope of evidentiary privileges can vary widely among the 50 States (each governed by its own statutory and common law), the federal courts (governed by Rule 501), Congress (governed by its own rules), and state and federal agencies. A communication is not privileged in all fora merely because it is privileged in one forum. A federal common-law privilege thus cannot guarantee confidentiality in all fora at all times, no matter how broadly or absolutely it is defined.

[9] "[P]redictability in the application of the privilege . . . is largely lacking in many areas," *McCormick* § 87, at 317; as an ABA publication acknowledges, "the privilege does not have the reach

Accordingly, the precise question at hand is how *broadly* the Court should fashion the attorney-client privilege—in particular, whether it should retain its full force in a grand jury investigation after the death of the client. Almost all of the leading commentators who have devoted thoughtful attention to this issue have concluded that the privilege should *not* apply after death, particularly in criminal proceedings where the need for relevant evidence is at its zenith. This virtual consensus among leading commentators provides a persuasive indicator of "reason," see Fed. R. Evid. 501, and of the proper rule in the federal courts. See, *e.g.*, *Trammel*, 445 U.S. at 50 (narrowing scope of spousal privilege relying in part on fact that "[s]cholarly criticism of the *Hawkins* rule has . . . continued unabated"); *Hawkins* v. *United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring) (rule "criticized" by scholars, among others, warrants "most careful scrutiny").

We briefly chronicle the foremost examples:

• The American Law Institute, in the 1996 Proposed Final Draft of the Restatement of the Law Governing Lawyers, concludes that the privilege should *not* apply after death. To the contrary, under the ALI's approach, the tribunal should be "empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. . . . Permitting such disclosure would do little to inhibit clients from confiding in their lawyers." Restatement (Third) of the Law Governing Lawyers § 127 cmt. d (Proposed Final Draft Mar. 29, 1996).[10]

• Dean McCormick, on whom this Court and the Advisory Committee on the Rules of Evidence have often relied, states that the privilege should not apply after

many lawyers believe it has." E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 453 (1997).

[10] We are informed that the ALI membership has now approved the proposed draft of the Restatement of the Law Governing Lawyers.

death. "[T]o hold that in all cases death terminates the privilege . . . could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege." *McCormick* § 94, at 350.

• Professors Mueller and Kirkpatrick argue that the privilege should not survive death in criminal investigations and criminal proceedings. "A rule requiring occasional disclosure in this setting would not seriously undercut the utilitarian basis of the privilege." 2 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 199, at 380 (2d ed. 1994). A contrary rule, they conclude, could lead to "extreme injustice"—for example, "if a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences." *Ibid.*

• Professors Wright and Graham likewise maintain that the privilege should not apply after death. They argue that attorney-client communications would not be meaningfully affected, yet "imposing the privilege after the death will often result in a loss of crucial information because the client is no longer available to be asked what he knows." Wright & Graham § 5498, at 484. Wright and Graham pointedly note: "Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy." *Ibid.*

• Professor Wolfram relates McCormick's conclusion that the law should "provide generally that death ends the privilege in all cases." C. Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986). According to Wolfram, if the privilege is to terminate at death in will-contest cases (which it does), logic requires that the privilege terminate at death in all cases.

• Judge Learned Hand, during ALI debates in 1942, suggested that the privilege should not survive death. He stated that a communicant who dies "can have no more interests except in a remote way" and thus the ALI should consider that the privilege "die altogether with the communicant." 19 ALI Proceedings 143-144 (1942).

• Consistent with overwhelming scholarly authority, the court of appeals majority in this case—Judge Wald and Judge Williams—concluded that the privilege should not survive death in federal criminal proceedings.[11]

C. In the vast majority of cases in which the issue has arisen, courts have not applied the attorney-client privilege after the death of the client.

1. The question whether the privilege applies after the death of the client has arisen most often in will-contest disputes among the testator's heirs or devisees. According to an exhaustive study, roughly 380 of the 400 or so reported cases (95%) fall within this category of "testamentary" cases. See Simon Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45, 58 n.65 (1992).[12] In those cases, courts consistently have held that the attorney-client privilege does *not* apply after death of the client. Indeed, this Court

[11] As Wright and Graham note, "Wigmore is the only one of the major figures in evidence scholarship who did not favor ending the privilege with the death of the client." § 5498, at 484-485. Wigmore's view as to criminal proceedings is not clear, however. In his fleeting references to the posthumous privilege issue, Wigmore seems to have referred only to the two most prevalent kinds of cases where the issue arises: testamentary cases, where Wigmore says the privilege should not apply after death, § 2314, at 611-616, and cases in which the estate is a party in civil litigation against an outsider, where the information could be used to "the detriment" of the estate and where Wigmore says the privilege thus should apply, § 2323, at 630. But the privilege issue also can arise in criminal (and civil) cases after the client's death where the estate is *not* a party in the litigation, and the information is sought from the decedent's attorney as a third-party witness. In such cases, the information will not be used to the detriment of the estate. Wigmore does not separately analyze that situation, and it is thus unclear whether he would have concluded that the privilege should apply in those cases. In short, we caution against overreading Wigmore.

[12] This survey examined "essentially every case found where the client was dead and the operation of the attorney-client privilege was an issue." 6 Geo. J. Legal Ethics at 58 n.65.

long ago rejected application of the privilege after death in such a case, stating that "in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged." *Glover* v. *Patten*, 165 U.S. 394, 406 (1897).

By virtue of the rule established in these testamentary cases, operation of the attorney-client privilege "has in effect been nullified in the class of cases where it would most often be asserted after death." *McCormick* § 94, at 348; see also Wright & Graham § 5498, at 483-484 ("[I]n the one instance in which the issue was most likely to arise—where the client had died and information was sought from his surviving attorney about the client's estate —courts manipulated the privilege . . . so as to make the attorney's testimony available in disputes over succession to the client's property."). The testamentary rule reflects a longstanding policy judgment that the interest in accurately settling estates trumps the client's interest in confidentiality (or even the client's expectation of confidentiality).[13]

The testamentary rule is important, if not decisive, in assessing the appropriate rule for criminal cases. The public's need for determining whether a crime has been committed (and if so, by whom) warrants at least parity of treatment to that afforded the interest in resolving will contests with precise accuracy. *If "who gets Blackacre" is sufficient to trump the privilege after the client's death, then questions raised in the criminal process —who gets indicted, who gets convicted, who gets punished—are surely sufficient to trump the privilege after the client's death.* "[O]ur historic commitment to the rule of

[13] Inasmuch as testamentary cases represent the vast majority of cases in which the general issue of the posthumous privilege arises, and given the established rule in those cases, petitioners' blanket claim that the "overwhelming majority of decided cases supports the conclusion that the attorney-client privilege survives the client's death," Pet. Br. 19, is wrong.

law" is *"nowhere* more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon,* 418 U.S. at 708-709 (quotation omitted) (emphasis added). The longstanding principle that the public has a right to every person's evidence is thus "*particularly applicable* to grand jury proceedings." *Branzburg,* 408 U.S. at 688 (emphasis added). The testamentary rule suggests, *a fortiorari,* that a comparable rule should govern in federal criminal proceedings.

The testamentary rule further illuminates the issue at hand, inasmuch as it requires disclosure of sensitive and confidential communications to one's attorney about family members, friends, and associates. Those communications may reveal why particular individuals received specific bequests from the testator's estate and why others did not. Courts have recognized that "[e]state planning is an extremely personal and private endeavor and may be based on considerations one would prefer never to reveal." *Hitt* v. *Stephens,* 675 N.E.2d 275, 279 (Ill. App. 1997). The court of appeals noted that "a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed." Pet. App. 9a. In *Glover,* this Court identified a situation where the attorney "might testify as to what was said by the testator about the character of the children and his relations to their mother"—exquisitely private and sensitive communications, yet required to be disclosed pursuant to the testamentary rule. 165 U.S. at 408. As a general matter, therefore, the communications disclosed by operation of the testamentary rule likely are at least as private as the communications that might be disclosed in criminal investigations.[14]

[14] As a result, as one commentator perceptively has stated, the will-contest situation is "the one occasion *above all others* when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosures can be made after the client's death." Wolfram § 6.3.4, at 256 (emphasis added). If clients ever were to be chilled by the thought of post-death disclosure, it would occur when "the disparaging words they uttered about their heirs to their attorneys, but which they carefully excluded from their last wills, would nonetheless be revealed to all during probate hearings." B. Hood, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client,* 7 Geo. J. Legal Ethics 741, 767 n.156 (1994).

The testamentary rule thus applies even though disclosure of the decedent's attorney-client communications may adversely affect (i) the reputational interests of the decedent and (ii) the reputational (or legal) interests of persons whom the decedent cares about.

Petitioners strive mightily to avoid the import of the testamentary rule. They contend that clients intend that their attorney-client communications be disclosed. "[I]t is fair to presume," petitioners opine, that a client "would have wanted his or her testamentary intent fulfilled, *even at the cost of an embarrassing disclosure."* Pet. Br. 28 (emphasis added). But as the court of appeals rightly concluded, the testamentary rule does not "track" this notion of intent. Pet. App. 9a. It seems just as likely that some testators intend the sometimes elaborately memorialized documents to guide post-mortem disputes. Some clients might well conclude that settling their estates with precise accuracy is scarcely worth the cost of "an embarrassing disclosure"; others may think that accuracy is the paramount virtue worth whatever reputational cost is wrought. But that is ultimately neither here nor there: Courts compel disclosure in either event; indeed, they compel disclosure even if the personal representative opposes disclosure. Restatement § 131 cmt. b.

What is more, if it is "fair to presume that the client would have wanted his or her testamentary intent fulfilled, even at the cost of an embarrassing disclosure," Pet. Br. 28, then it is also "fair to presume" that the client would have wanted to provide relevant information to the grand jury. After all, the "sacrifice" caused by providing information to the grand jury is "a part of the necessary contri-

bution of the individual to the welfare of the public," *United States* v. *Dionisio*, 410 U.S. 1, 10 (1973) (quotation omitted), and has "long been recognized as a basic obligation that every citizen owes his Government," *United States* v. *Calandra*, 414 U.S. 338, 345 (1974).[15] In a criminal investigation, the client with relevant information would testify truthfully before the grand jury and tell all he knows.[16] After death, the attorney would simply disclose the factual information that the client himself would have disclosed were he alive.[17]

In all events, regardless of the shorthand employed,[18] the testamentary rule reflects a settled policy judgment that the interest in accurately settling estates overrides any interest in posthumous confidentiality of attorney-client communications. The rule petitioners propose—that the privilege applies, in perpetuity, in criminal proceedings after the client's death—would create a dramatic and irrational inconsistency with the rule that the privilege is

[15] Even on the facts here, as Judge Williams pointedly noted at oral argument, Tr. 29-30, it is unclear why petitioners assume that Mr. Foster would have wanted the truth about the Travel Office to be concealed, or why the law should credit such an intent, in any event. The interest in truth is especially strong when the underlying events concern public business.

[16] If a client asserted the Fifth Amendment privilege, he could be granted immunity and required to testify truthfully. See 18 U.S.C. 6002, 6003.

[17] By contrast, the testator is not required to testify and disclose the reasons underlying his intended property distribution. In a will contest, the attorney, in relaying his client's statements and intent, discloses what otherwise would *not* have been disclosed. That further demonstrates that the intrusion caused by the testamentary rule *exceeds* that caused by terminating the privilege at death in criminal investigations.

[18] Some have suggested that the privilege does not apply in testamentary cases because the identity of the privilege holder is in dispute during the will contest. Most codes now provide that the executor or administrator, not an heir, holds the privilege in civil cases where the estate is a party; this theory thus is inaccurate.

inapplicable in will-contest cases after the client's death. Neither reason nor experience justifies such a jurisprudential oddity.

2. Outside the testamentary context, cases actually *deciding* the issue of a posthumous attorney-client privilege are quite rare. A comprehensive survey found only about 20 such reported cases. See 6 Geo. J. Legal Ethics at 58 n.65. It is even more rare to unearth any legal analysis of the issue: "Rarely do courts elaborate at all on why the rule is or should be so. An exhaustive examination of the cases . . . found only a few judicial opinions offering any extensive discussion of whether or not the privilege should outlive the client." *Id.* at 57 & n.63. As the court of appeals pointed out, "such cases as do actually apply it give little revelation of whatever reasoning may have explained the outcome." Pet. App. 3a. "Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy." Wright & Graham § 5498, at 484.

Civil cases outside the testamentary context fall into two categories. In the first, the estate is *not* a party to the litigation; instead, one of the parties to a lawsuit seeks information from the decedent's attorney. In the second, the estate is a party in litigation, and the opposing party seeks information from the decedent's attorney.

As to the former category, we are aware of only *one* decision that sets forth any analysis. See *Cohen* v. *Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). There, the court concluded that the privilege did not survive death. The *Cohen* court pointed out that (i) the estate was not involved in the suit, (ii) the decedent was not subject to liability, and (iii) the decedent's statements to his attorney could be quite important in the litigation. *Id.* at 692-694.[19]

[19] Petitioners deride the decision as that of a "mid-level state appellate court," Pet. Br. 20, but the case contains far more analysis

In contrast, when the estate *is* a party in a (non-will-contest) civil lawsuit—such as an alleged tort or breach of contract by the decedent—different interests are at stake. When the estate is a party to non-testamentary civil litigation, the estate's financial interests are at stake; the estate's worth will vary with the damages awarded for or against it. Some courts have applied the privilege in this setting so that the estate's financial interests cannot be adversely affected by the party-opponent's use of the decedent's attorney-client communications. This situation differs substantially, however, from civil cases in which the estate is not a party (and where the estate's financial interests are not at stake) and from criminal cases (where the estate's financial interests are not at stake and the need for relevant evidence is at its greatest).

This Court in *Glover* stated that the attorney-client communications "*might* be privileged if offered by third persons to establish claims *against an estate*." 165 U.S. at 406 (emphases added). The Court's language conveys doubt whether the privilege applies after death even when the estate is a party, and it indicates that cases where the estate is not a party present even less of a reason to apply the privilege.

3. We turn now from the civil to the criminal arena. In that context, five reported state supreme court cases—and no federal cases—have decided the issue.[20] In two cases (involving husbands who had allegedly murdered their wives), the courts held that the privilege did not

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(which is to say, it contains analysis) than almost all of the other cases discussing the question whether the attorney-client privilege applies after death.

[20] In three decisions by lower state courts, defendants sought information from the attorney of a deceased client. The courts upheld the privilege claims. See *People* v. *Pena*, 198 Cal. Rptr. 819, 828-829 (Cal. App. 1984) (manslaughter); *People* v. *Modzelewski*, 611 N.Y.S.2d 22, 22-23 (N.Y. App. Div. 1994) (assault); *Cooper* v. *State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983) (murder).

exclude communications the wives had made to attorneys before the murders. See *State* v. *Gause*, 458 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); *State* v. *Kump*, 301 P.2d 808, 815 (Wyo. 1956) ("We can conceive of no public policy which would exclude the communications such as are involved in this case, if otherwise admissible."). In the three remaining cases, where the decedent was a suspect or witness who possessed relevant information, the courts held (over dissents in two cases) that the privilege did apply after death. See *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *State* v. *Macumber*, 544 P.2d 1084 (Ariz. 1976); *State* v. *Doster*, 284 S.E.2d 218 (S.C. 1981); cf. *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 72 (Nolan, J., dissenting) (privilege should not apply "where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling"); *Macumber*, 489 P.2d at 1088 (Holohan, J., joined by Cameron, C.J., specially concurring).

Those cases, in our view, illustrate the profound problems with a privilege that applies after death in criminal proceedings, and thus with petitioners' theory. Suppose, for example, that a crime has been committed and that a now-deceased witness had previously communicated factual information to an attorney that would exculpate the defendant. Under petitioners' theory, that information would not be subject to compelled disclosure—notwithstanding that the defendant might be wrongly indicted or convicted as a result.

These were the facts in *State* v. *Macumber*, the 3-2 decision of the Supreme Court of Arizona holding that the privilege continued to apply after death. The upshot was to expose the defendant to a possible life sentence for a crime that he theoretically may not have committed. This manifest injustice led the American Law Institute to reject *Macumber* as an example of the attorney-client privilege. Restatement § 132 reporter's note (*Macumber* illustration

was rejected by a vote of 164 to 65). Yet the result in *Macumber* is precisely where petitioners' theory would lead.

The now-deceased witness might, on the other hand, have furnished his attorney with information that could incriminate a still-living suspect. That situation, likewise, implicates a substantial societal interest. "[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). The government has a "powerful and legitimate interest in punishing the guilty." *Id.* at 421 (O'Connor, J., concurring); see also *Stone* v. *Powell*, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring) ("The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade."). Not only does the public have an interest in seeing the criminal law vindicated, but so, too, do the victims of a crime. See *Payne* v. *Tennessee*, 501 U.S. 808, 825 (1991). Petitioners' approach, however, would allow even "a murderer . . . still at large and likely to strike again" to evade justice. *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 73 (Nolan, J., dissenting).

The rule we seek thus is neutral between the defendant and the prosecutor in seeking evidence from a third party. It ensures that more rather than less, whether exculpatory or inculpatory, will be presented to the factfinder. And that is the rightful goal of the prosecutor, see *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the courts. see *Nixon*, 418 U.S. at 709.

Realizing that their theory leads to manifestly unjust results for criminal defendants, petitioners offer a possible *ad hoc* exception for criminal defendants. They then assert *ipse dixit* that "[t]o allow a prosecutor to break the privilege on the ground that a grand jury's constitutional right to investigate is on a par with possible constitutional

rights of a criminal defendant would be a radical, problematical step fraught with unforeseen consequences." Pet. Br. 29. With all respect, that statement is unintelligible. This Court has stated: "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed *either by the prosecution or by the defense.*" *Nixon*, 418 U.S. at 709 (emphasis added).[21] And we are not aware of (and petitioners do not reference) a third-party witness' common-law privilege that applies against the prosecution, but not against the defense.[22]

In any event, no basis exists for granting a criminal defendant greater power than the *grand jury* to override a witness' common-law privilege. The text of the Fifth Amendment reveals that the grand jury is a constitutionally mandated protection against an unfounded prosecution. And this Court has emphasized the grand jury's dual role: "Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed *and the protection of citizens against unfounded criminal prosecutions.*" *Calandra*, 414

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[21] The Compulsory Process Clause ensures parity between prosecutor and defendant in overriding the privileges of a third-party witness; it does not give the defendant a greater ability to do so than the prosecutor. See A. Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 699-700 (1996).

[22] Indeed, petitioners' *ad hoc* suggestion of a possible distinction between the defendant and prosecution contravenes settled practice when a third-party witness asserts the Fifth Amendment privilege against compelled self-incrimination. In that situation, the prosecutor can compel the witness to testify through a grant of immunity. See *United States* v. *Heldt*, 668 F.2d 1238, 1282-1283 (D.C. Cir. 1981). The prosecutor thus has a greater ability to override a third-party witness' privilege than does the defendant.

Petitioners also imply that *Davis* v. *Alaska*, 415 U.S. 308 (1974), supports a distinction between the abilities of the grand jury and the defendant to override a third party's common-law privilege claim. That Confrontation Clause case is not on point. It addressed a state rule that impermissibly limited the scope of cross-examination.

U.S. at 343 (emphasis added); see *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) (grand jury is "primary security to the innocent against hasty, malicious and oppressive" prosecution). The "mission is to *clear the innocent*, no less than to bring to trial those who may be guilty." *Dionisio*, 410 U.S. at 16-17 (emphasis added).

Because the grand jury's task "is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Branzburg*, 408 U.S. at 688. The grand jury—as much as any party—therefore has the constitutional right to every person's evidence. If a defendant could override a third-party witness' common-law privilege at trial, the grand jury can do so now.

The practical implications of petitioners' apparent attempt to distinguish the grand jury from a defendant further expose the flaws of their theory. Petitioners state that their notes can be withheld as a matter of law from the grand jury—even if they might exculpate some individual. But if the grand jury indicts the individual, then that defendant might subpoena petitioners' notes, which could be exculpatory. Not to put too fine a point on it, petitioners' theory could mean that this grand jury will indict one or more individuals who later will be exonerated with the help of petitioners' notes. That does not reflect "reason."

In short, petitioners' suggestion that "[t]he Court can decide the present matter without reaching the different issue of a defendant's possible constitutional right to privileged material," Pet. Br. 29, is fanciful. To hold in petitioners' favor is a decision that the perpetual attorney-client privilege for the deceased client's attorney overrides the rights of the grand jury, the defendant, *and* the prosecutor to obtain evidence—no matter how inculpatory or exculpatory the information might be. If the result in *Macumber* (whereby a criminal defendant, and thus also a grand jury, cannot obtain the evidence of an attorney for

a deceased client) represents the correct privilege rule for the federal courts, petitioners should prevail. If the result in *Macumber* does not represent the correct rule for federal courts, petitioners must produce their notes.

4. We turn next to the various rules and codes—including state codes, the Model Code of Evidence, the Uniform Rules, and Proposed Federal Rule 503—to determine what light they might shed on the issue. See, *e.g.*, *Trammel*, 445 U.S. at 48-49.

As a prelude, it is important to note that the various interests at stake do not terminate simultaneously after death. The *financial* interests of the estate terminate when the estate is closed. A privilege rule designed to protect the financial interests of the estate would apply in the period until the estate is closed.

The reputational interests of the decedent and the legal interests of the decedent's friends or associates, by contrast, do not expire when the estate is closed; to the contrary, such interests continue indefinitely. Thus, a privilege rule designed to protect those interests would apply indefinitely.

While "almost no attorney-client privilege provision speaks directly to the issue of privilege after the client's death," 6 Geo. J. Legal Ethics at 55 n.52, the rules generally provide that the attorney-client privilege ends *at death* in will-contest cases. Many (including the Model Code, Uniform Rules, and Proposed Federal Rule) also include a generic provision to the effect that the privilege belongs to the "personal representative of a deceased client," who is the executor or administrator of the decedent's estate. See Restatement § 127 reporter's note ("In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client[,] either an executor or administrator.").[23]

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[23] The following provisions set forth the testamentary rule that the privilege does not apply after death: Proposed Fed. R. Evid.

The executor or administrator exists, however, only until the estate is closed. After that, then, no holder of the privilege exists, and the privilege has terminated. The rules thus suggest that the privilege cannot be asserted after the estate is wound up.[24] As the court of appeals

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503(d)(2); ALI Model Code of Evid. R. 213(2)(a) (1942); Unif. R. Evid. 26(2)(b) (1953); Unif. R. Evid. 502(d)(2) (1974); Ala. R. Evid. 502(d)(2); Ark. R. Evid. 502(d)(2); Cal. Evid. Code § 957; Del. R. Evid. 502(d)(2); Fla. Stat. Ann. § 90.502(4)(b); Haw. R. Evid. 503(d)(3); Idaho R. Evid. 502(d)(2); Kan. Stat. Ann. § 60-426(b); Ky. R. Evid. 503(d)(2); La. Code Evid. Ann. art. 506(C)(2); Me. R. Evid. 502(d)(2); Neb. Rev. Stat. § 27-503(4)(b); N.H. R. Evid. 502(d)(2); N.J. Stat. Ann. § 2A:84A-20(2); N.M. R. Evid. 11-503(D)(2); N.D. R. Evid. 502(d)(2); Okla. Stat. Ann. tit. 12 § 2502(D)(2); Or. R. Evid. 503(4)(b); Tex. R. Evid. 503(d)(2); Utah R. Evid. 504(d)(2); Vt. R. Evid. 502(d)(2); Wis. Stat. Ann. § 905.03(4)(b).

The following rules provide for the "personal representative" of the deceased to hold the privilege: Proposed Fed. R. Evid. 503(c); ALI Model Code of Evid. R. 209(c)(i) (1942); Unif. R. Evid. 26(1) (1953); Unif. R. Evid. 502(c) (1974); Ala. R. Evid. 502(c); Ark. R. Evid. 502(c); Cal. Evid. Code § 953(c); Del. R. Evid. 502(c); Fla. Stat. Ann. § 90.502(3)(c); Haw. R. Evid. 503(c); Idaho R. Evid. 502(c); Kan. Stat. Ann. § 60-426(a); Ky. R. Evid. 503(c); Me. R. Evid. 502(c); Miss. Code Ann. § 13-1-21(1); Neb. Rev. Stat. § 27-503(3); Nev. Stat. Rev. § 49-105(1); N.H. R. Evid. 502(c); N.J. Stat. Ann. § 2A:84A-20(1); N.M. R. Evid. 11-503(C); N.D. R. Evid. 502(c); Okla. Stat. Ann. tit. 12 § 2502(C); Or. R. Evid. 503(3); S.D. R. Evid. 502(c); Tex. R. Evid. 503(c); Utah R. Evid. 504(c); Vt. R. Evid. 502(c); Wis. Stat. Ann. § 905.03(3); Wyo. Stat. § 1-43-103(b).

[24] The history behind this language confirms that the "personal representative" provision was an intentional limitation on the duration of the privilege:

> It was the view of the reforming scholars that shaped the provision in the [1942] Model Code of Evidence that made "the personal representative of the deceased client" the holder of the privilege after the death of the client, thus cutting off the privilege when the estate was wound up. . . . [*T*]*he attempts by traditionalists to extend the life of the privilege beyond the winding up of the estate through amendments that would have made the privilege pass to the heir or devisee or have given the judge discretion to invoke the privilege when there was no longer a holder in existence were all defeated.* It seems reasonable to suppose that the use of similar language in the Uniform Rules was intended to have a similar effect. . . . The writers apparently agree that the Rejected [Federal Rule 503] intends to embrace the Model Code-California view of the phrase "personal representative" as a limitation on the duration of the privilege . . . .

Wright & Graham § 5498, at 485-486 (emphasis added).

[25] In the words of the comment accompanying the California rule, "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." Cal. Evid. Code § 954 cmt. Proposed Federal Rule 503(c) followed the California rule. See advisory committee's note. The import of the Proposed Federal Rule was straightforward: "[W]hen the client has died and his personal affairs have been settled, the need for the privilege has diminished to the extent that it is no longer justified." Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 Wayne L. Rev. 1287, 1315 (1969).

explained, "[v]esting the privilege in the personal representative is plainly consistent with its terminating at the winding up of the estate, when its function of protecting the decedent's transmission of his or her property to the intended beneficiaries, free from claims based on statements to counsel, has run its course." Pet. App. 4a n.2. The intent of these rules thus is not to protect the reputational interests of the client or the legal or reputational interests of others, all of which outlast the estate. Rather, the intent is to protect the financial interests of the estate itself.[25]

Disclosure of attorney-client communications in *criminal* cases (where the estate is not a party) would not affect the financial interests of the estate, however. Rather, the disclosure in criminal proceedings—whether before or after the estate is wound up—would affect only the reputational interests of the decedent and the legal and reputational interests of others. But as we have seen, these privilege rules were not intended to protect the reputational interests of the client or the legal or reputational

interests of others. And if that is so, then the privilege should not apply after death in criminal proceedings.[26]

To be sure, the various rules do not speak directly to criminal proceedings. Nor is there helpful case law discussion regarding the import of the "personal representative" language to the issue. But the task is to divine whatever guidance we can from the rules (and their history) as one of the mix of considerations that guide resolution of this case. Here, the rules support the conclusion that the privilege does not apply after death in federal criminal proceedings.

And when the rules are analyzed together with the vast majority of cases, a broader theme emerges. Attorney-client communications are not privileged after the death of the client—with the possible exception that communications "might be privileged if offered by third persons to establish claims against an estate," or vice versa. *Glover*, 165 U.S. at 406. The upshot is this: The privilege should not apply after death in criminal cases.

D. The policies of the attorney-client privilege are not served, and indeed are contravened, by applying the privilege in federal criminal proceedings after the death of the client.

Notwithstanding (i) the Restatement, (ii) the views of scholars and commentators, (iii) the force of the case law, (iv) the injustices petitioners' approach would inevitably produce in criminal proceedings, and (v) the principles underlying the various privilege rules, petitioners rest much of their argument on a purported "chilling effect"—namely, that clients would be less willing to disclose truthful information to an attorney without a posthumous

[26] Petitioners do not suggest that the winding up of the estate is significant to the proper privilege rule in *criminal* procedings—and we agree. For criminal proceedings, the privilege either must end at death (as we argue) or extend such that it can be asserted indefinitely (as petitioners argue).

attorney-client privilege for federal criminal proceedings. For several reasons, the argument fails. As we will now explain, the rule that the privilege does not apply after death in criminal proceedings would not chill *any* appropriate attorney-client communications. Even if there were some marginal chilling effect, it is insufficient to frustrate the grand jury's imperative need for information.

1. The attorney-client privilege, to the extent it existed in England from the 1500s through the 1700s, was part of the broader "code of a gentleman" that prevented attorneys as well as other "gentlemen" from breaching anything told to them in confidence. Restatement § 118 cmt. c; 3 *Weinstein's Federal Evidence* § 503.03[1], at 503-11 (2d ed. 1998); D. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 3-4 (1998). An attorney thus was a kind of alter ego of the client, such that if the client did not testify, then neither could the attorney.[27] This was a rule "congenial with the law, which prevailed in England until the mid-19th century, that made parties to litigation themselves incompetent to testify, whether called as witnesses in their own behalf or by their adversaries." Restatement § 118 cmt. c.[28]

In this country, the privilege has never been justified by any such social convention. Indeed, by the last quarter of the 1700s, the "code of a gentleman" rationale had been repudiated, as "the need of the ascertainment of truth for the ends of justice loomed larger than the pledge of secrecy." *McCormick* § 87, at 314. This Court thus has recognized that "the mere fact that a communication was made in express confidence, or in the implied confidence

[27] Some older American cases exhibit rhetorical excesses—a "lawyer's tongue is tied"—that are relics of the days when the privilege was justified by the permanent oath of a gentleman.

[28] For that reason, "the historical record is not authority for a broadly stated rule" of attorney-client privilege. G. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1070 (1978).

of a confidential relation, does not create a privilege." *Branzburg*, 408 U.S. at 682 n.21.

The modern rationale for the attorney-client privilege is that confidentiality facilitates an individual's ability to obtain effective legal advice and services. See *Zolin*, 491 U.S. at 562; *Upjohn*, 449 U.S. at 389; *Fisher*, 425 U.S. at 403. This conception of the privilege stems from several related assumptions. Individuals need lawyers to determine whether their conduct would or did violate legal norms, and how to respond to the legal process. In addition, the client needs to disclose various facts to the lawyer in order for the client to receive the lawyer's best assessment of the legal ramifications of his actions. *Zolin*, 491 U.S. at 562. The final assumption—which is "controversial"—is that clients would be unwilling to fully disclose facts if the lawyer could be required to testify in their cases. Restatement § 118 cmt. c. The theory is that the client "has in contemplation the possible official inquiry, and he will not make revelations that may be used to his detriment." E. Morgan, *Foreword to Model Code of Evidence* 26 (ALI 1942). See also M. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 490 (1928) (privilege protects against clients' "fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties").[29]

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[29] Many scholars have questioned whether this assumption is accurate outside the context of those cases in which the client subsequently asserts the Fifth Amendment privilege against compelled self-incrimination. Indeed, the leading empirical study of the privilege concluded that lawyers are more likely than non-lawyers to believe that the privilege encourages client disclosures. That study concluded that a substantial majority of laypersons would continue to use lawyers even if secrecy were limited. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1232 (1962).

2. In a particular legal proceeding in which the client becomes a witness, the client will do one of two things: (i) rest on the Fifth Amendment privilege against compelled self-incrimination, or (ii) testify. The attorney-client privilege serves somewhat different purposes in the two situations.

For the client who invokes the Fifth Amendment, the attorney-client privilege stands as a corollary to the privilege against compelled self-incrimination. *Weinstein's Federal Evidence* § 5.03.03[1], at 503-12 (attorney-client privilege "is closely related to the individual's right to immunity from self-incrimination under the Fifth Amendment"). That is to say, the client needs to disclose facts to his attorney to obtain the attorney's advice about whether to interpose the Fifth Amendment privilege. Effective professional consultation could scarcely occur if the attorney could be required to turn around and testify against the non-testifying client. See *Fisher*, 425 U.S. at 403 (recognizing that client would be reluctant to disclose "if the client knows that damaging information could *more readily* be obtained from the attorney following disclosure than from himself"—that is, in those situations where the client asserts the Fifth Amendment) (emphasis added). For this reason, supporters and critics alike generally acknowledge the importance of the attorney-client privilege in cases where the client also asserts the Fifth Amendment privilege.[30]

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[30] See, *e.g.*, Morgan, *Foreword*, at 27 ("In situations where the privilege against self-incrimination is involved, the retention of the privilege is justified."); Wright & Graham § 5472, at 95 ("combined effect of the Sixth Amendment right of counsel and the Fifth Amendment privilege against self-incrimination is sometimes thought to provide a constitutional basis for the attorney-client privilege"); Wigmore § 2291, at 552 (attorney-client privilege in case where client asserts privilege against self-incrimination protects against "some of the same evils" that "constitute the reasons for forbidding compulsory self-incrimination"); Radin, 16 Cal. L. Rev. at 490 (justification for attorney-client privilege is "part of the public policy against self-incrimination").

Those clients who do not invoke the Fifth Amendment privilege fall into two categories: clients who will testify truthfully under oath, and those who will not.

The attorney-client privilege would be of enormous benefit to the client who contemplated perjury because he could learn from his attorney the legal consequences of his actions and testimony, and then change (or mold) his testimony in an attempt to evade those consequences. That is an unhappy byproduct of the privilege, but it is *not* a justification for the privilege. See *Brogan* v. *United States*, 118 S. Ct. 805, 810 (1998) (law does not confer "a privilege to lie"); *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely."). The law manifestly is not designed to benefit the client who will perjure himself. See *United States* v. *Mandujano*, 425 U.S. 564, 576 (1976) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings."). "When a client consults a lawyer intending to violate elemental legal obligations, there is less social interest in protecting the communication. Correlatively, there is a public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends." Restatement § 132 cmt. b. Therefore, just as "*Miranda* cannot be perverted into a license to use perjury," *Oregon* v. *Hass*, 420 U.S. 714, 721 (1975) (quotation omitted), the attorney-client privilege cannot be perverted into an aider and abettor of perjury.

Indeed, the courts and the bar organizations, including the ABA, have taken steps to prevent such client wrongdoing. Longstanding ethical rules, of which this Court spoke approvingly in *Nix* v. *Whiteside*, require that an attorney take action to prevent a client from testifying falsely—even though the upshot will be to breach the confidentiality of attorney-client communications and (possibly) lead to "grave consequences" for the client. See

ABA Model Rule of Professional Conduct 3.3 cmt.[31] The crime-fraud exception likewise is triggered when a client communicates to his attorney in order to further the future crime of perjury. See *Clark* v. *United States*, 289 U.S. 1, 15 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."); A. Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 698-699 (1996) ("The Sixth Amendment gives the accused a right to show he did not engage in 'infamous' conduct, not a right to perpetrate infamous conduct . . . .").

The client who will testify truthfully, on the other hand, will simply tell her attorney the same *facts* that she will disclose under oath. See *Upjohn*, 449 U.S. at 395 ("[T]he protection of the privilege extends only to communications and not to facts.") (quotation omitted).[32] For such a client, the lack of a privilege would cause no meaningful "chilling effect" on the *truthfulness* of communications to her attorney because the truth would "be revealed anyway . . . from the client directly in discovery or testimony." Fischel, 65 U. Chi. L. Rev. at 26; cf. *Brogan*, 118 S. Ct. at 810 ("the honest and contrite guilty person will not regard . . . the blatant lie as an available option" when she chooses to testify).

3. These conclusions about how the privilege interacts with the behavior of clients raise an important question: Why does federal law recognize the attorney-client privilege in cases in which the client testifies? The answer is twofold.

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[31] This duty distinguishes attorneys from other professionals who receive evidentiary privileges, yet no equivalent duty.

[32] "Whether the client be a plaintiff or a defendant or a mere witness, he is subject to compulsory process and may be required to disclose at the trial or hearing every pertinent fact within his knowledge, under the sanction of an oath or its equivalent that obliges him to tell the whole truth. If he told his lawyer the truth, he must now tell the same thing from the witness box." Morgan, *Foreword*, at 26.

First, the privilege rests on an assumption that the attorney's testimony would be superfluous because the client himself "can be freely interrogated and called to the stand by the opponent and made to disclose [o]n oath all that he knows." Wigmore § 2292, at 554. Thus, "the disclosure of his admissions made to his attorney would add little to the proof." *Ibid.*

This Court pointed to that critical fact in explaining the logic and rationale of the attorney-client privilege in *Upjohn*: "Here the Government was free to question the employees who communicated" with the company attorneys, and that "puts the [Government] in no worse position" in obtaining the facts. 449 U.S. at 396, 395.[33] The court of appeals correctly summarized the relevant principle: The client's "availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth." Pet. App. 7a.

To be sure, there is a lurking danger that the client will testify falsely and in a manner inconsistent with what he told his attorney. But the client is under a legal obligation, enforced by stringent penalties, to testify truthfully. See *Mandujano*, 425 U.S. at 576; 18 U.S.C. 1001, 1621, 1623. That obligation is reinforced by the rigors of cross-examination. And it is cemented by the attorney's equally solemn duty to prevent perjury. See ABA Model Rule of Professional Conduct 3.3. *So the attorney-client privilege in instances where the client testifies operates on the assumption that the client will testify truthfully, which logically eliminates any need for attorney testimony.* See *Upjohn*, 449 U.S. at 395 (privilege "puts the adversary in no worse position" because it "does not protect disclosure

[33] See also *Hickman* v. *Taylor*, 329 U.S. 495, 518 (1947) (Jackson, J., concurring) ("Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself."). Professors Wright and Graham have noted the privilege's proponents "argue that its costs are minimal. . . . [T]he client . . . must still testify to his knowledge of the facts." Wright & Graham § 5472, at 85.

of the underlying facts by those who communicated with the attorney").

Second, the attorney's testimony can easily generate a sideshow focused on purported discrepancies between the attorney's testimony and the client's testimony. See *Hickman* v. *Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring) ("Whenever the testimony of the witness would differ from the 'exact' statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness."). If attorney and client both testify, "[o]pposing counsel could create a false impression of the circumstances in a great many instances. . . . [A] lawyer skilled in histrionics could make a field day of it." J. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 Vill. L. Rev. 279, 310 (1963). Such diversions, if successful, could easily detract from, rather than contribute to, the truthseeking function. And the diversions could perhaps even cause the client to lose the case (or some future case).[34] The privilege thus precludes the "abusive litigation practice" of calling an opposing lawyer as a witness. Restatement § 118 cmt. c.

4. As suggested by the virtually unanimous position of the ALI, the commentators, the case law, and the rulemakers, these justifications for the attorney-client privilege evaporate when the client is deceased, particularly in criminal proceedings.

First, the possibility of criminal liability ceases at death. The privilege is no longer necessary after the death of the

[34] The rationales for the attorney-client privilege in cases in which the client testifies substantially overlap with the rationales for the attorney work product doctrine. That should not be surprising, given that the two doctrines stem from the same common-law source and often apply to the same documents. See Note, *Attorney-Client Privilege and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 Harv. L. Rev. 1697, 1700 (1995); Wright & Graham § 5472, at 94 ("the attorney-client privilege and the work product doctrine have had something of a symbiotic historical relationship").

client as a corollary to the privilege against compelled self-incrimination.[35]

Second, the deceased client obviously will not testify. Thus, the myriad problems that can arise when both attorney and client testify in the same case are absent.

Third, the client is not available to testify directly. Application of the privilege after death thus causes an enormous loss of evidence—far more than is caused by application of the privilege before death.[36] "[I]mposing the privilege after the death will often result in a loss of crucial information because the client is no longer available to be asked what he knows." Wright & Graham § 5498, at 484. In other words, application of the privilege after death of the client "in effect gives *an expanded scope* to the privilege." Wolfram § 6.3.4, at 256 (emphasis added). The court of appeals emphasized this critical fact, noting that the "costs of protecting communications after death are high." Pet. App. 7a.

The only real retort is one that petitioners understandably do not *explicitly* make: The living client might perjure himself if he were alive; requiring the attorney to testify after the client's death thus discloses different in-

[35] This may distinguish the deceased witness from the witness who is simply unavailable. With respect to the unavailable witness who is not deceased, the attorney's testimony may contribute to his criminal liability in some future case, notwithstanding that the witness might have asserted the Fifth Amendment had he been available to testify in the underlying case.

[36] Some living clients may assert the Fifth Amendment privilege, but such witnesses not uncommonly can be granted immunity if they are not prosecuted. See 18 U.S.C. 6002, 6003. If the witness is granted immunity, "[t]he immunity . . . does not endow the person who testifies with a license to commit perjury." *Mandujano*, 425 U.S. at 578 (quotation omitted). Because the witness will testify, the attorney's testimony is considered unnecessary. If the witness is not granted immunity, then the attorney-client privilege is necessary to protect the privilege against compelled self-incrimination.

formation than the client would have disclosed were he alive; therefore, clients who want to preserve the option to commit perjury are "chilled" from telling their attorneys the truth because of the fear that the truth might come out if the attorney is called to testify after the client's death.

It would be unprecedented and unwise to apply an expanded privilege after death based on the possibility that the client, if alive, might have chosen to perjure himself in violation of federal law. Yet that is what petitioners' submission implicitly seeks from this Court. Indeed, petitioners' entire theory is acrid with the odor of presumed perjury—perjury that the client might have committed had he been alive. The Court need not "write into our law this species of compassion inflation." *Brogan*, 118 S. Ct. at 810.

In the end, the rule that the privilege does not apply after death in criminal proceedings should cause *no* chilling effect whatsoever on *appropriate* attorney-client communications—that is, on clients who intend to testify truthfully or assert the Fifth Amendment.

5. Even if we were to assume, however, that (i) the rule we seek could have some chilling effect on clients who would assert the Fifth Amendment or testify truthfully, *or* (ii) the courts should be concerned about a chilling effect on those who would commit perjury, petitioners' chilling effect argument is still unavailing for several independent reasons. Any possible chilling effect would be extraordinarily marginal; and marginal chilling effects on protected relationships are insufficient, the law has clearly established, to justify an intrusion on the grand jury's need for relevant evidence.

At the outset, petitioners' argument based on chilling effect assumes that clients know the details of the relevant confidentiality and privilege rules when they speak to lawyers. The minimal available evidence suggests that the

assumption is inaccurate. "The privilege has intricate and unexpected limitations of which we may be certain almost no client has ever been warned." Marvin Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 Colo. L. Rev. 51, 59 (1982). Indeed, the "most striking revelation" of a study conducted in the late 1980s was that "lawyers overwhelmingly do not tell clients of confidentiality rules." F. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 382 (1989).[37]

Second, assuming full client knowledge, analysis of a rule's possible effect on candid client communications must consider (i) the likely frequency of disclosure; (ii) the fora in which the information would be disclosed; and (iii) the additional information that would be disclosed by virtue of the rule in question.

Disclosure of attorney-client communications after the death of the client in federal criminal investigations is likely to be quite infrequent. This is the first reported federal case, and there are only a handful of reported state criminal cases. In addition, information sought from an attorney must be relevant. See Fed. R. Crim. P. 17(c).[38]

The attorney's information is disclosed to a grand jury that, by law, operates in secret. See Fed. R. Crim. P.

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[37] Informing clients that the privilege terminates at death would sound like a *Miranda* warning, petitioners say. Pet. Br. 12. Petitioners' rhetoric is familiar. The "*Miranda* warning" hypothetical has regularly been invoked by those who oppose *existing* legal and ethical precepts requiring lawyers to prevent client perjury. See M. Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A. J. 428, 431 (1982). The rhetoric conjures up an image of the lawyer—as alter ego of the client first and officer of the court a distant second—that was rejected by this Court in *Nix* v. *Whiteside*.

[38] For example, as the court of appeals concluded, the district court on remand may review the notes and determine which parts of petitioners' notes are relevant to the grand jury's Travel Office investigation.

6(e). "[T]he characteristic secrecy of grand jury proceedings is a further protection against the undue invasion" of an important relationship. *Branzburg*, 408 U.S. at 700.[39] To be sure, public criminal trials can develop out of grand jury investigations. At trial, however, only relevant *and* admissible statements are disclosed—and hearsay rules will limit the chance of admissibility. Cf. Fed. R. Evid. 804(b).[40]

The factual information disclosed by the attorney will simply be the same information that the client, if alive, would have disclosed himself. As noted above, that fact logically eliminates any chilling effect. And the client will be deceased when the attorney discloses the client's information, a fact that alleviates the most direct harm (*i.e.*, liability) that the client could foresee while talking to his or her attorney.

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[39] Also, the lack of an evidentiary privilege does *not* mean that attorneys are free to voluntarily disclose client information to the public. See ABA Model Rule of Professional Conduct 1.6.

[40] The court of appeals stated that attorney-client communications of the deceased client will be produced in criminal proceedings if their "relative importance is substantial." Pet. App. 10a. In the grand jury context, that formulation, which the court of appeals found "plainly met" here, *id.* at 11a, is equivalent to relevance: Relative importance is a constantly shifting concept (sometimes on a daily basis) in a grand jury investigation. "It is only after the grand jury has examined the evidence" that such a determination can be made. *Branzburg*, 408 U.S. at 701-702; see also *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

The court of appeals predicted that when there is an "abundance of disinterested witnesses with unimpaired opportunities to perceive an unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality." Pet. App. 10a. That is accurate in the trial setting. In the grand jury context, as this Court emphasized in *Branzburg*, the government cannot and thus need not show that the subpoena recipients "possess relevant information not available from other sources" because this determination can be made only after a "thorough and extensive investigation." 408 U.S. at 701.

Third, the law has established several rules relating to the attorney-client relationship that pose *serious* risks to the confidentiality of attorney-client communications. Therefore, even assuming a marginal effect on client communications by a rule that the privilege does not apply after death in criminal proceedings, that effect would pale by comparison to the effect caused by these settled rules.

One is the rule that the attorney cannot assist or even tolerate client perjury. Model Rule of Professional Conduct 3.3(a)(4) states: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."[41] In *Nix* v. *Whiteside*, this Court emphasized that there is "no breach of professional duty in [an attorney's] admonition to [his client] that he would disclose [the client's] perjury to the court. . . . No system of justice worthy of the name can tolerate a lesser standard." 475 U.S. at 174. In light of Model Rule 3.3 (and its local versions), a client talking to his attorney should know that the law and his attorney will prevent him from dishonestly altering his story when he later testifies.[42]

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[41] Comments to Model Rule 3.3 state:

> Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. . . . Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.

[42] There is anecdotal evidence that lawyers do *not* seek the full factual picture from their clients so as not to trigger their ethical responsibilities. This technique is followed "in order to avoid being compromised in deciding whether to put [the client] on the witness stand." S. Gillers, *Regulation of Lawyers* 390 (4th ed. 1995). Moreover, clients often lie to their lawyers. "How much clients lie to lawyers . . . is a regular topic, the consensus suggesting a lot." Marvin Frankel, *Clients' Perjury and Lawyers' Options*, 1 J. Inst. for Study of Legal Ethics 25, 35 (1996).

These two facts illustrate the *enormous* chilling effect caused by existing ethics rules.

The attorney's actual or threatened disclosure of attorney-client communications in order to prevent perjury can produce "grave consequences" for the client. Such consequences are *far more direct* and *far more severe* than the possibility of harm to one's reputation and one's associates caused by *posthumous* disclosure of attorney-client communications in a criminal investigation.

The other relevant factor, as explained above, is the testamentary rule. Even assuming that clients would be marginally chilled by the prospect of a posthumous disclosure of attorney-client communications in a criminal investigation, the testamentary rule poses at least as great a chilling effect on attorney-client communications—yet the law has required disclosure in such cases. Cf. *University of Pennsylvania*, 493 U.S. at 201 (rejecting chilling-effect argument in peer review case by comparing it to chilling effect in reporter's source privilege case, which the Court had already rejected).

In sum, even assuming that some marginal chilling effect is caused by terminating the privilege at death, that effect is outweighed by the imperative need for relevant evidence exacerbated by the deceased client's unavailability. See *Branzburg*, 408 U.S. at 695 ("we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants").

E. A client's desire to protect his reputation or to protect others does not itself justify nondisclosure of information either before or after death.

Petitioners expend considerable energy and rhetoric proving the unremarkable proposition that individuals care

about their reputations, and that at least some persons also care about their posthumous legacy. Petitioners note, in addition, that clients care about their loved ones, friends, and associates. We agree. But these truisms fail to advance petitioners' argument.

When living, the client cannot refuse to disclose information on the ground that it might harm his reputation. The Fifth Amendment applies only to testimony that would be self-*incriminating*. *Calandra*, 414 U.S. at 353. ("[A] witness has no right of privacy before the grand jury.").[43] Nor can the client refuse to disclose information on the ground that it might be incriminating or damaging to others. *Mandujano*, 425 U.S. at 572 ("The privilege cannot . . . be asserted by a witness to protect others from possible criminal prosecution."). The individual must disclose all relevant information—and must do so truthfully. See 18 U.S.C. 1001, 1621, 1623.

After death, the attorney's testimony in some cases might conceivably affect the decedent's posthumous reputation (positively or negatively) or the decedent's associates (positively or negatively). But *the information is the same factual information that the client himself would have been legally required to disclose if he were alive.* Such information is disclosed *not* because of the client's death, but because the client's information has been sought in a criminal investigation or trial. The client's death means only that the attorney, rather than the client himself, will provide the information. Petitioners' rule, by contrast, would mean that important information the client possesses would be disclosed if the client is alive, but concealed from the grand jury if the client is deceased. That would result in the anomaly that the protection of

[43] Posthumous reputation is generally *less* protected by the libel and defamation laws than reputation of a living person. See *Robertson* v. *Wegmann*, 436 U.S. 584, 591 n.6 (1978) ("action for defamation abates on the plaintiff's death in the vast majority of States").

the client's reputation and the client's associates would be greater after the client's death.[44]

F. The rule that the privilege does not apply after death in federal criminal proceedings is not discriminatory.

Petitioners argue that "people in the final stages of life frequently feel a particular need to speak with an attorney to put their own affairs in order or to resolve family or business problems." Pet. Br. 19. But the most likely issue about which a dying client might consult his attorney to "order his affairs" is his will and the disposition of his property. *Yet that is the precise circumstance where this Court and courts throughout the country have consistently concluded that the privilege does not survive death.* See Wright & Graham § 5498, at 484 n.13 ("The common instance of concern for posthumous regard is the client who is writing a will or otherwise providing for the devolution of his property.").[45]

And again, the relevant event for disclosure is not the fact of death, but the fact that the client's information is sought in a criminal proceeding. If an individual consults an attorney and the client's information is later sought in

[44] "[I]f the attorney-client privilege were intended to vindicate a regime of privacy, one would be inclined to extend a similar protection to all other arguably private relationships. Friends and lovers, for example, are surely at least as intimate in their interactions as an attorney and his client. Yet a protection of such great scope would swallow up much of the law of evidence." Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 483 (1977).

[45] In petitioners' featured hypothetical, a client consults an attorney to seek legal advice about matters that threaten his friends, associates, and family. Pet. Br. 7. But that scenario does not appear even to meet the threshold elements of the privilege. "[T]he privilege will not arise if the person claiming it sought the interview with or retained the attorney to enable the attorney to advise or assist someone else." M. Larkin, *Federal Testimonial Privileges* § 2.02, at 2-17 (1998).

a criminal proceeding, the client must testify truthfully; if he is deceased, his attorney will simply disclose the same information that the client would have disclosed.

II. THE WORK PRODUCT DOCTRINE DOES NOT PROTECT PETITIONERS' NOTES.

As we contended in the court of appeals, and do so again in this Court, either of two alternative arguments—each related to the fact that Mr. Foster is deceased—resolves the work product issue readily and narrowly.

A. The work product doctrine has not been applied to protect work prepared by an attorney for a client who now is deceased and no longer can be a party in litigation.

Our initial work product argument essentially duplicates our attorney-client privilege argument. It would be contrary to settled work product principles, not to mention illogical, to apply the work product doctrine on behalf of a deceased client.[46]

The theory of the work product doctrine—explicit in Civil Rule 26(b)(3) and assumed to apply to grand jury proceedings by inference from *United States* v. *Nobles*, 422 U.S. 225, 238 (1975)—demonstrates that the doctrine cannot be asserted to protect work done by an attorney for a client who is now deceased. As initially conceived and applied, the work product doctrine applied *only* in the litigation for which the work was performed. The question later raised was whether the work product doctrine should apply to documents that were prepared by the client's attorney in anticipation of some *other* litigation. See Note, *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 855-861 (1983). This Court effectively resolved the question in *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 25-26 (1983), suggesting that the doctrine should be

[46] Thus, if we prevail on the attorney-client issue, we should prevail on the work product issue.

so extended. It would be unfair to penalize a party in litigation by requiring it to produce work its attorneys had produced for other litigation. In particular, litigants "who face litigation of a commonly recurring type . . . have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." *Id.* at 31 (Brennan, J., concurring).

But the rationale for extending the work product doctrine in *Grolier* does not extend so far as to cover work prepared for a client who no longer will be involved in litigation *at all*. Therefore, because all possibility of criminal litigation ceases with the client's death, the purposes of the work product doctrine could not conceivably be served in any way by applying it to an attorney's work for a client who is now deceased.[47] The doctrine has not been extended so far—and should not be extended so far here.

B. Alternatively, because Mr. Foster is deceased and thus unavailable for questioning, the OIC has demonstrated sufficient need for petitioners' notes.

For purposes of our alternative work product argument, the key fact is that the witness (Mr. Foster) interviewed by Mr. Hamilton is now deceased. In such circumstances, the settled rule is that the grand jury can obtain an attorney's notes of the interview to the extent they reflect or relate a witness' statements or recollections and the contextual questions asked.

Opinion work product (the mental impressions, conclusions, opinions, or legal theories of an attorney) receives

[47] The work product doctrine protects the interests of the client. To do so, the doctrine applies to legal work performed for the client. "From its inception, . . . the courts have stressed that the [work product] privilege is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself." *Moody* v. *IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981) (quotation omitted).

a very high level of work product protection. See Fed. R. Civ. P. 26(b)(3). Fact or ordinary work product (such as a witness' transcribed, recorded, or signed statement) is subject to disclosure upon a showing of need—when, for example, the witness is now deceased or otherwise unavailable for questioning. See Fed. R. Civ. P. 26(b)(3) advisory committee's note; *Hickman*, 329 U.S. at 511 ("[P]roduction might be justified where the witnesses are no longer available . . . .").

Here, we are concerned not with a transcribed or recorded interview or signed statement, but with attorney notes of a witness interview. Petitioners suggest that *no* portions of an attorney's notes, even the factual elements of a witness interview, can ever be produced, even upon a showing of witness unavailability. Pet. Br. 33 & n.37. In petitioners' view, attorney notes are inviolable under all circumstances. That is clearly wrong.

Courts have not treated attorneys' memoranda or notes of witness interviews in an all-or-nothing manner, as entirely fact work product or entirely opinion work product. Instead, the factual portions of the attorney notes—such as those recording or reflecting what the witness said and the contextual questions asked—must be produced upon a showing of need (for example, an unavailable witness).

It is established that "a showing that a witness is deceased is usually sufficient to require the production of work-product materials." E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 354 (1997). Two federal courts of appeals have addressed this situation and followed this common-sense rule. See *In re John Doe Corp.*, 675 F.2d 482, 492-493 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224, 1232 (3d Cir. 1979). See also Restatement § 138 cmt. c.[48] Petitioners' argument to the contrary is unsupported by law or policy.

[48] The Second Circuit noted that one of the employees had a "hazy" memory and other potential witnesses had invoked the privilege against self-incrimination, so the government had "met its burden of showing a substantial need." 675 F.2d at 492 n.10 & 493. The court permitted discovery of the attorney's notes because "[w]hat is sought is what Employees A and B said, not the attorney's evaluation of potential liability or thoughts as to use at trial." *Id.* at 492. The Third Circuit reached the same conclusion in considering an attorney's memoranda of an interview of a deceased witness. The court found that the grand jury could obtain the attorney's memoranda, in redacted form, because the memoranda were relevant and the government was unable to secure the information from the deceased client directly. 599 F.2d at 1231-1232.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded with directions that an order be entered requiring the district court to compel petitioners to produce forthwith the relevant portions of the July 11, 1993, notes.

Respectfully submitted.

KENNETH W. STARR
Independent Counsel

BRETT M. KAVANAUGH
CRAIG S. LERNER
Associate Counsel

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